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NEW ALBANY BOARD OF ZONING
APPEALS and CITY OF NEW ALBANY:

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W. HOUSER CANTER,)
)
 Appellant,)
)
 vs.) No. 22A01-0705-CV-195
)
 NEW ALBANY BOARD OF ZONING)
 APPEALS, CITY OF NEW ALBANY,)
 TED R. FULLMORE, WILLIAM ARBOUGH,)
 and DAVID BARKSDALE,)
)
 Appellees.)

May 28, 2008

BAILEY, Judge

Case Summary¹

W. Houser Canter (“Canter”) appeals the trial court’s judgment affirming the New Albany Board of Zoning Appeals’ (“BZA”)² denial of his application for a conditional use permit. We affirm.

Issues

On appeal, Canter asserts multiple claims and raises several issues.³ We consolidate, re-order, and re-state the issues as follows:

- I: Whether the BZA’s denial of Canter’s Application for Conditional Use was based upon substantial evidence;
- II: Whether the BZA deprived Canter of his due process rights under the Fourteenth Amendment;⁴
- III: Whether the trial court erred in denying Canter’s claim for inverse condemnation; and
- IV: Whether the trial court erred in denying Canter’s claim for equitable estoppel.

Facts and Procedural History

Canter has been a builder in the New Albany community since 1969. The City of New Albany (“City”) held a lien on 801 Catherine Place (“801 Catherine”), a vacant lot

¹ We held oral argument in the State House on April 8, 2008.

² The Appellee’s Brief was filed by the BZA and the City of New Albany. The other three appellees did not submit a brief.

³ Each argument must contain the appellant’s contentions supported by cogent reasoning, citation to authority and to the Record, the applicable standard of review and a brief statement of the procedural and substantive facts necessary for consideration of the issue. Ind. Appellate Rule 46(A)(8)(a, b). Failure to comply with Indiana Appellate Rule 46(A)(8) waives the argument. Majors v. State, 773 N.E.2d 231, 235 n.2 (Ind. 2002). Canter therefore waived the following arguments: equal protection and jurisdiction.

situated in an “RN-1, Residential Neighborhood District.” Appendix at 22. In the Fall of 2003, Canter met with the City’s Building Commissioner and other City officials to discuss vacant lots in the City and the development of affordable housing. Discussions that day or later may have focused on three sets of plans and on 801 Catherine as being a potential site for development.

Canter paid the City at least \$8000, obtained title to 801 Catherine in early 2004, secured a sewer permit, and built a foundation, which the City approved. On April 27, 2004, Canter applied for a building permit to place a manufactured home on 801 Catherine. In May of 2004, a City employee told Canter that he would have to apply for a conditional use permit. On May 24, 2004, a City employee “observe[d] construction of [a] structure at 801 Catherine.” Id. at 50. On May 25, 2004, Canter submitted his conditional use application; “the home was set on the foundation” that same day.⁵ Id. at 22.

Canter failed to appear for the first BZA hearing scheduled on the application. At the BZA’s hearing on August 3, 2004, opponents testified that Canter’s home was not compatible with other homes in the neighborhood. Specifically, they voiced concern that “the roof pitch of the dwelling was much too shallow at 4:12 pitch when nearby roof pitches are minimally 9:12 and greater.” Id. at 97. The City’s staff had essentially the same concern. The BZA denied Canter’s application, informing him a week later.

⁴ Canter cites Article I, Section 12 of the Indiana Constitution, but makes no argument that the analysis is different from the Fourteenth Amendment.

⁵ In Canter’s Verified Petition submitted to the Floyd Circuit Court, he “affirm[ed], under the penalties for perjury, that” “[o]n June 6, 2004, I was told by the city representatives that I would have to apply for a conditional use permit for this property.” Appendix at 22, 25. On his Application for Conditional Use, two different facsimile stamps read “05/25/2004 03:11” and “May 25 04 03:42p ouser Canter.” Exhibit 1. Canter filled out all blanks on the application, except “Date Filed.” Id.

During a meeting with the Mayor and a City employee, Canter agreed to change his application so that it could be re-submitted to the BZA. Specifically, “he stated that he would alter the roofline and other features to try to make the dwelling more responsive to the existing architecture.” Id. at 104. Canter submitted a second application. However, during a March 1, 2005 hearing, a City employee testified “that the applicant submitted substantially the same application as that denied by the Board previously.” Id. at 102. The BZA denied Canter’s second application, informing him in writing on March 10, 2005.

On March 29, 2005, Canter filed with the trial court a “Verified Petition for Writ for Review by Certiorari and Complaint for Violation of Civil Rights to Enjoy Property and for Inverse Condemnation.” Per the title, the document contained two causes of action: deprivation of a right under 42 U.S.C. § 1983 and inverse condemnation. Seven days later, the BZA adopted written findings of fact and conclusions of law in support of its decisions of August 3, 2004 and March 1, 2005.

The trial court heard testimony of Canter and a City employee. On March 2, 2007, the trial court affirmed the BZA’s denial of Canter’s application and denied Canter’s two claims for relief. Canter now appeals.

Discussion and Decision

I. BZA’s Denial of Application for Conditional Use

A. Standard of Review

Our Supreme Court recently reiterated the standard by which trial and appellate courts review zoning board decisions.

A trial court and an appellate court both review the decision of a zoning board with the same standard of review. A proceeding before a trial court or an appellate court is not a trial de novo; neither court may substitute its own judgment for or reweigh the evidentiary findings of an administrative agency. The appropriate standard of review, “whether at the trial or appellate level, is limited to determining whether the zoning board’s decision was based upon substantial evidence.”⁶

St. Charles Tower, Inc. v. Bd. of Zoning Appeals of Evansville-Vanderburgh County, 873 N.E.2d 598, 600 (Ind. 2007) (quoting Crooked Creek Conservation and Gun Club, Inc. v. Hamilton County N. Bd. of Zoning Appeals, 677 N.E.2d 544, 547 (Ind. Ct. App. 1997), trans. denied) (other citations omitted) (emphasis added). “[S]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support the decision of the board of zoning appeals.” St. Charles Tower, 873 N.E.2d at 601.

B. Analysis

Title XV (Land Usage), Chapter 156 (Zoning Code) of the City’s ordinances provides as follows:

Section 156.095 Certain Conditional Uses Permitted.

Certain land uses, construction and operations are specified as conditional uses in §156.075 instead of being permitted by right, although they may have beneficial effects and serve important public interests. They are subject to the conditional use regulations because they may, but do not necessarily, have adverse effects on the environment, overburden public services, change the character of an area, or create major nuisances. A review of these uses is necessary due to the potential individual or cumulative impacts

⁶ The trial court’s record is obviously not relevant to this analysis, as it did not exist at the time of the BZA’s decision. Canter effectively acknowledged this in response to our final question at oral argument. Accordingly, the City’s response to Canter’s Request for Admissions is inapposite. Regardless, the City admitted only that Canter’s home was an “Industrialized Building System” for purposes of Indiana Code Articles 22-12 to -15 (fire safety and building laws) and therefore was exempt “from local regulation governing construction.” Appendix at 54 (emphasis added). The City did not admit that Canter’s home was exempt from local zoning regulation.

they may have on the surrounding area or neighborhood. The conditional use review provides an opportunity to allow the use when there are minimal or favorable impacts, to allow the use but impose measures to mitigate potentially adverse effects, or to deny the use if the adverse effects cannot be mitigated or resolved. The conditional uses lists in §§156.075 through 156.079, and their accessory buildings and uses, may be permitted by the Board in the districts indicated in accordance with the procedure set forth in §156.096.

Section 156.096 Procedure for Conditional Use.

(A) On receipt of an application for a conditional use by the property owner, the Zoning Officer shall refer such application to the Secretary of the Board for public notice and public hearing by the Board. After public notice and hearing according to law, the Board may grant the permit including the imposition of conditions, restrictions, and requirements on the use which the Board deem essential to insure that the conditional use is consistent with the spirit, purpose and intent of the chapter, will not substantially and permanently injure the appropriate use of neighboring property, and will not adversely affect the public health, safety, morals, and welfare. The applicant bears the burden of proof in meeting the criteria for the granting of a conditional use.

(B) In considering the proposal for a conditional use and imposing conditions, restrictions and requirements, the Board shall consider, in addition to any other pertinent factors.

(1) For a two-family dwelling or for a single family lot narrower than 40 feet in width in an RN-1 district, the following:

(a) The extent to which the exterior appearance of the dwelling and site is consistent with the exterior appearance and architecture of adjoining and nearby residences and buildings and/or whether a local Historic Review Board has endorsed the exterior appearance of the dwelling and site.

App. at 77, 79 (emphases added). There is no dispute that these sections of the City's ordinance apply here and that the home is a single-family dwelling in an RN-1 district on a lot narrower than forty feet. Furthermore, the ordinances make plain that Canter had the burden of proving the criteria for a conditional use (§ 156.096) and that the BZA had

authority to deny the application (§ 156.095). Finally, the fundamental criterion for considering the application was the home's exterior appearance and whether that was consistent with the exterior appearance and architecture of nearby residences.

At the hearing on Canter's first application, the City's staff and people opposing the application testified that Canter's relatively flat roof was not consistent with the steep roofs in the neighborhood. Canter made a series of arguments, but as to the actual criteria of Section 156.096, he "not[ed] that he would not install landscaping because it would raise the price of the dwelling making it no longer affordable, and that he would not change the pitch of the roof whatsoever." App. at 97. Testifying regarding his second application for a conditional use, Canter asserted that, in his conversation with the mayor, the "suggested changes included adding some architectural details to the existing porch." Id. at 101. Opponents and staff testified that the home's "size, form, shape and details, including window size and shape, were not in character with dwellings in the vicinity; that, specifically, the roof pitch of the dwelling was much too shallow at 4:12 pitch when nearby roof pitches are minimally 9:12 and greater." Id. at 101-02. They also stated that Canter's application was "substantially the same application as that denied by the Board previously." Id. at 102.

In applying for a conditional use, Canter had the burden of proving the criteria in Section 156.096. Despite this, the BZA's record indicates that Canter never presented any testimony to the BZA regarding whether his home's exterior appearance was consistent with the appearance and architecture of nearby residences. Instead, he argued that he did not need any local building or zoning permits because state inspectors had approved the manufactured

home before it left the factory. Furthermore, he asserted that the City's former Building Commissioner and the City housing employee had approved the home.

The BZA's denial of Canter's Application for Conditional Use was based upon substantial evidence of non-conformity.⁷

II. Due Process

Canter argues that "the City of New Albany" denied him due process because it: (1) failed to promptly and substantively inform him of the reasons for its denial of his application; (2) was biased against manufactured housing; and (3) Section 156.096 is void for vagueness.

A. Standard of Review

The Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. "When considering the constitutionality of a statute [or regulation], we begin with the presumption of constitutional validity, and therefore the party challenging the statute [or regulation] labors under a heavy burden to show that [it] is unconstitutional." Szpunar v. State, 783 N.E.2d 1213, 1219 (Ind. Ct. App. 2003) (quoting State v. Moss-Dwyer, 686 N.E.2d 109, 112 (Ind. 1997)).

B. Analysis

On appeal, Canter argues that the City failed to promptly and substantively inform him of the reasons for its denial of his application. The BZA heard Canter's first application

⁷ Canter acknowledged during oral argument that he had not appealed from the BZA's denial of his first Application for Conditional Use.

on August 3, 2004 and his second application on March 1, 2005. On March 10, 2005, the BZA informed Canter in writing that it had denied his application. Canter filed his Verified Petition on March 29, 2005. A week after Canter appealed to the trial court, the BZA issued two “Findings of Fact and Conclusions of Law,” one for each application. App. at 96-104.

As noted by the Floyd Circuit Court, property owners are charged with knowledge of ordinances that affect their property. Town Council of New Harmony v. Parker, 726 N.E.2d 1217, 1226 (Ind. 2000), amended on other grounds by, 737 N.E.2d 719 (Ind. 2000). Meanwhile, it is not error for the BZA to adopt its findings even several months after its hearing. See McBride v. Bd. of Zoning Appeals of Evansville-Vanderburgh Area Plan Comm’n, 579 N.E.2d 1312, 1316 (Ind. Ct. App. 1991). Where a zoning board completely fails to make written findings, the remedy is to remand the matter to the board so that it may adopt findings. See Holmes v. Bd. of Zoning Appeals of Jasper County, 634 N.E.2d 522, 525 (Ind. Ct. App. 1994). Accordingly, the fact that Canter filed his Verified Petition prior to the BZA’s adoption of findings is of no moment. Furthermore, the second hearing was held on March 1, 2005, and Canter acknowledges on appeal that the “earliest that he was told of the problem with the roof line was August 10, 2004.” Appellant’s Brief at 20. Opponents criticized the pitch of Canter’s roof in both hearings, including that of August 3, 2004. Even if Canter was not aware of the BZA’s concern with his roof in advance of the hearing on August 3, 2004, he certainly had notice of the issue far in advance of the March 1, 2005 hearing. This argument is unavailing.

Next, Canter argues that the “City of New Albany” was partial in that it was biased

against manufactured housing. He presented no evidence to this effect in hearings before the BZA. In front of the trial court, he testified that all of the information he received from the “Zoning people” pertained to manufactured housing. Tr. at 147. He stated that the City was biased against manufactured housing and that a City employee had told him that a conditional use permit would be required for manufactured housing. None of his assertions, however, pertained to the board of zoning appeals, the entity whose decision is appealed here. For its part, a City employee testified at the first hearing that “the dwelling would require a Conditional Use permit whether it was manufactured or site- (stick-) built.” App. at 97. Essentially, Canter offered no evidence that the BZA was biased.

Finally, Canter asserts that “[t]he aesthetic portion of the zoning ordinance is void because it is vague” and that “[t]he rule lacks objective standards.” Appellant’s Br. at 16, 17. “Due process requires that ‘standards should be written with sufficient precision in order to give fair warning as to what the agency will consider in making its decision.’” Worman Enter., Inc. v. Boone County Solid Waste Mgmt. Dist., 805 N.E.2d 369, 378 (Ind. 2004) (quoting Union Tank Car, Fleet Operations v. Comm’r of Labor, 671 N.E.2d 885, 889 (Ind. Ct. App. 1996), trans. denied).

Canter applied for a building permit on April 27, 2004. The City informed him that he would need a conditional use permit. On May 25, 2004, less than one month after submitting his initial building application, Canter placed the home at 801 Catherine and applied that very day for a conditional use permit. Canter acknowledged at oral argument that he never received a building permit for 801 Catherine.

Canter was charged with knowledge of Section 156.096. See Town Council of New

Harmony, 726 N.E.2d at 1226. Even if Canter lacked actual knowledge of Section 156.096, the BZA's record makes clear that, at the hearing on the first application, opponents referenced "the criteria for a Conditional Use" and criticized the pitch of Canter's roof. App. at 97. City staff also criticized the roof pitch and referenced "the criteria for conditional use." Id. Despite having heard the testimony from opponents and City staff in August of 2004, Canter made no attempt whatsoever to meet his burden of proof at the hearing in March of 2005. At minimum, he had notice that multiple people in the community considered roof pitch to be relevant. The ordinance would have given a person reasonable opportunity to consider the roof pitch to be part of a home's exterior appearance. See Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (requiring that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.") Per the plain language of the ordinance, comparison to the exterior appearance of nearby homes was required. Yet Canter submitted no evidence of his home's exterior appearance or that of nearby homes, other than to admit that he had promised the mayor that he would make some changes to the porch.

As noted above, Canter failed to meet his burden of proof pursuant to the ordinance, much less to carry the heavy burden of establishing that the ordinance was vague. Neither the City nor the BZA denied Canter his right to due process.⁸

III. Inverse Condemnation

Canter claims that the trial court erred in denying his claim for inverse condemnation. "[I]nverse condemnation occurs only 'when the land use regulation prevents all reasonable

use of the land.’” Leeper Elec. Serv., Inc. v. City of Carmel, 847 N.E.2d 227, 233 (Ind. Ct. App. 2006) (quoting Town of Georgetown v. Sewell, 786 N.E.2d 1132, 1140 (Ind. Ct. App. 2003)) (emphasis in Leeper), reh’g denied, trans. denied. By the clear terms of the ordinance, Canter could build or place a home at 801 Catherine if its exterior appearance was consistent with nearby residences. The ordinance does not prevent all reasonable use of the land.

IV. Equitable Estoppel

Canter asserts that he relied on a City agent’s representation that the home could be placed on 801 Catherine. Appellant’s Br. at 9. “Estoppel is not generally applicable against government entities for the actions of public officials.” Biddle v. BAA Indianapolis, LLC, 860 N.E.2d 570, 581 (Ind. 2007). There is an exception for a person who presents clear evidence of: ““(1) a promise by the promisor (2) made with the expectation that the promisee will rely thereon (3) which induces reasonable reliance by the promisee (4) of a definite and substantial nature and (5) injustice can be avoided only by enforcement of the promise.’” Id. (quoting First Nat’l Bank of Logansport v. Logan Mfg. Co., 577 N.E.2d 949, 954 (Ind. 1991)).

At the second BZA hearing, Canter testified “that he spoke with the former Building Commissioner and the Housing Rehabilitation Coordinator for the Department of Redevelopment, both of whom approved the proposed dwelling.” App. at 101. The two or three City officials present, however, were not members of the BZA. Canter acknowledges his building experience in the community. An experienced builder could not reasonably rely

⁸ Having so concluded, we need not reach Canter’s claim made pursuant to 42 U.S.C. § 1983.

on a conversation with City employees to substitute as authority of the BZA. Canter admitted as much during oral argument. The trial court did not err in denying Canter's claim for equitable estoppel.

Conclusion

The BZA's denial of Canter's application was based upon substantial evidence. Neither the City nor the BZA denied Canter his right to due process. The trial court did not err in denying Canter's claims for inverse condemnation and equitable estoppel.

Affirmed.

NAJAM, J., and CRONE, J., concur.